United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-1083

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- X

LENIN ENCISO-CARDOZO, EDWIN MICHAEL ENCISO, Minor :

Petitioners :

v. : #74-1083

IMMIGRATION AND NATURALIZATION SERVICE, :

Respondent :

- X

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PETITION FOR REHEARING

In the case of Lenin Enciso-Cardozo, and Edwin Michael Enciso, Minor, v. Immigration and Naturalization Service, petitioners respectfully request a rehearing in accordance with Rule 40 before the original panel and not as a request to the Court en banc :

The Court, on October 29, 1974, in affirming the decision of the Board of Immigration Appeals, held that under some circumstances due process might require that the

infant be permitted to participate in the deportation proceedings against his parents but that in this case there had been no denial of due process since there had been no showing of prejudice to the infant from refusal to allow the infant to intervene. It is submitted that in making this decision, the Court has overlooked one point of fact and has misapprehended a crucial provision of the Immigration and Nationality Act. In support of this petition for rehearing, petitioners respectfully offer two points for the consideration of the Court:

> 1. PETITIONERS DID IN FACT, AT THE ADMINISTRATIVE LEVEL, OFFER TO MAKE PROOF OF THE EFFECT OF DE FACTO DEPORTATION ON THE CHILD. COUNSEL WAS UNABLE TO PROVE PREJUDICE BECAUSE THE EVIDENCE TENDERED WAS REJECTED OR HELD IRRELEVANT. IF THE OPINION OF OCTOBER 29,1974 STANDS, THE COURT SHOULD REMAND THE CAUSE TO PERMIT INTRODUCTION OF THAT PROOF WHICH WAS EXCLUDED AND WHICH THE COURT HOW HOLDS IS CRUCIAL.

The attention of the Court is invited to the following portions of the Transcript of Deportation Hearing:

Page 7, lines 15-20: Counsel for Mrs. Enciso sought to establish the economic effect on the family if the parents were to return to Mexico. The objection of the Trial Attorney

to these questions was sustained by the Immigration Judge, who commented (page 7, line 23) that " Nothing solid can be based on this kind of conjecture".

Page 8, lines 22-26; page 9, lines 1-8:In spite of the disinclination of the Judge to consider such evidence, counsel attempted again to bring to the attention of the Court the effect on the child of the parents' leaving. Over the Immigration and Naturalization Service Trial Attorney's objection that the question was highly speculative, the Judge allowed the question of what would happen to the child if the parents were granted voluntary departure and left the country. The mother responded that if she left, she would have to take the baby with her because she would not leave him here. She testified that she knew that the grant of voluntary departure meant that she would have to obey the law and leave the country.

Page 9, lines 19-26: The Immigration Judge did not comment but asked if counsel had anything else. Counsel then attempted to reserve a place in the record for an affidavit which had been prepared by the Director of Special

Services for Children of the City of New York, with special reference to this case, as to what would happen to the child were the parents to return to Mexico without him. Counsel suggested it would be appropriate for the Government to consider this question before an appeal were taken to the Board of Immigration Appeals.

Page 10, lines 9-19: The Trial Attorney said that this was not a contested issue since the mother had already stated that she would want to take the child with her if granted voluntary departure. Overruling counsel's suggestion that it was a contested issue because a guardian appointed for the child would argue that the child had a constitutional right to remain in the United States and might want to raise this issue on behalf of the child, the Judge held that there was no relevancy in this issue to the application of Mrs. Enciso for voluntary departure, but that counsel would file such affidavit with any appeal he might make.

Accordingly, said affidavit was submitted to the Board of Immigration Appeals on April 9, 1973, with the brief, which asserted that had the child's interest been

given an opportunity to be heard, he would have been in a position to prove the extent of his deportation. The Board of Immigration Appeals did not consider or discuss the interest of the child but relied wholly on the Amoury case and others in this line of cases. (See Decision of the Board of Immigration Appeals, page 2). This Court has now receded from a blanket endorsement of Amoury as being dispositive of counsel's argument concerning the child's alleged rights on the only issue on which intervention is significant; that is, voluntary departure as an administrative remedy.

Moreover, not having been permitted to prove the infant's case at the administrative level, petitioners could not seek to introduce evidence before this Court, relating to the infant's situation. Nevertheless, the Court rested its opinion on the absence of evidence which was excluded. The relief which petitioners request by this petition is to remand to permit proof to be made in the proceedings below.

2. AS A MATTER OF LAW, UNDER THE PROVISIONS OF THE IMMIGRATION AND NATIONALITY ACT, THE ALIEN PARENT IS NOT LEGALLY COMPETENT TO PRESENT THE INTEREST OF THE CHILD. THE INTEREST OF EDWIN MICHAEL ENCISO IS TO HAVE HIS PARENTS STAY WITH HIM IN THE UNITED STATES. THE MOTHER IS PRECLUDED BY REGULATION FROM SEEKING THIS REMEDY. THE INTEREST OF THE CHILD IS SEPARATE AND DISTINCT FROM THAT OF THE PARENT. THEREFORE, THE MOTHER IS THE LEAST COMPETENT PARTY TO REPRESENT THE CHILD, AND INTERVENTION SHOULD HAVE BEEN GRANTED.

Under the provisions of the Immigration and Nationality Act, the alien who has conceded the truth of the allegations of the Order to Show Cause, must leave the United States. Exceptions are made only for one who is eligible to apply for certain benefits or to meet the requirements for certain waivers, none of which are possible here.

The only relief from deportation available to Mrs. Enciso was an application, pursuant to Section 244(e) of the Act and 8 U.S.C.A. 244, to the Immigration Judge for voluntary departure. (8 U.S.C.A. 242.17(b)). An Immigration Judge, under the provisions of 8 U.S.C.A. 244.1, may "...in his discretion, authorize the alien to depart voluntarily... in lieu of deportation within such time as may be specified

...." when the Immigration Judge first authorized voluntary departure, and " under such conditions as the District Director shall direct". However, this discretion can be exercised only ...." if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States".

Ths child is aggrieved by the deportation of the parent. The interest of the child would best be served by having the parent remain. He must be able to raise the facts and issues which relate to his aggrievement. He alone is competent to request the remedy of extended voluntary departure because by regulation, if the alien declares his interest in staying indefinitely and declares himself not be willing to depart promptly, the only recourse of the Immigration Judge is to order deportation and to deny voluntary departure. Indeed, as petitioners pointed out above, the record discloses that in order to preserve the right to depart voluntarily, the mother was forced to abandon the presentation of the child's interests and agreed that she would, of course, obey the law and leave the country (See Transcript of Deportation Hearing, page 9, lines 1-8).

The parent cannot protect her own interest and that of the child. Their interests under the law are antithetical, inconsistent and conflicting. Indeed she is that person least competent to argue this interest of the citizen child.

The holding in Enciso leaves open the question: Under what circumstances does due process require that an infant be permitted to participate in the deportation proceedings against his parent.

This case falls within that narrow class of cases where there is no challenge to the power of Congress to determine who shall be eligible for permanent residence, and where it has been conceded that the birth of the infant citizen makes his parents immediately eligible to apply for permanent residence .(See 8 U.S.C.A. 1182 (a)(14); 22 C.F.R. 42.62(b)(2)(ii), and 22 C.F.R. 42.91 (a)(14)(i)(c)). Mr. and Mrs. Enciso have priority to immigrate as of March 29, 1973 in accordance with 22 C.F.R. 42.62 (b)(2)(ii).

The deportability of the parent in such cases does not arise, as in Acosta and Amoury, from the parents' statutory ineligibility for permanent residence. The interest

of the child in having the parents remain in the United States is not sought to be weighed against the authority of Congress. The infant seeks to intervene solely on the question of administrative remedy where the right to an eventual lawful status has been conceded.

CONCLUSION

When, on its facts, the case falls within this narrow class, and where the attempts of counsel to offer argument and evidence relating to the interest of the child have been rejected, and where the parent is legally unable to represent the interest of the child without jeopardizing his own interest, due process requires and no policy consideration precludes, intervention by the child in the administrative proceeding and a full and fair hearing of the extent of the injury which may be visited upon him if the deportation of his parents is promptly enforced.

For the reasons submitted, it is requested either that the cause be remanded for further proceedings

or that argument before the original panel be granted.

Respectfully submitted,

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COPY RECEIVED

November 12, 1974

UNITED STATES ATTORNEY

Copy received November 12, 1974

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